

BEFORE THE
GOVERNING BOARD OF THE
EMPIRE UNION SCHOOL DISTRICT
COUNTY OF STANISLAUS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

MICHAEL LINGG,

Respondent.

Case No. 2012040230

PROPOSED DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on April 23, 2012, in Modesto, California.

Attorney Roman J. Munoz represented the Empire Union School District (District). Assistant Superintendent, Human Resources, David Garcia also attended the hearing on behalf of the District.

Respondent Michael Lingg represented himself.

Evidence was received, the record was closed, and the matter was submitted for decision on April 23, 2012.

SUMMARY

The Board of Trustees of the Empire Union School District has determined that it is necessary to reduce or eliminate particular kinds of services at the end of the 2011-2012 school year and therefore seeks to reduce or eliminate a 1.00 full-time equivalent (FTE) certificated position. Mr. Lingg has been given preliminary notice that his services will be reduced or eliminated at the end of the 2011-2012 school year. As discussed below, cause exists for the Board of Trustees to reduce or eliminate a 1.00 FTE certificated position. No junior certificated employee is being retained to perform a service which Mr. Lingg is certificated and competent to perform. Therefore, the District may give him notice that his services will be reduced or will not be required for the 2012-2013 school year.

FACTUAL FINDINGS

1. David Garcia is the Assistant Superintendent, Human Resources, of the District. He made and filed the Accusation solely in his official capacity.

2. Mr. Lingg is a permanent certificated employee of the District. Prior to March 15, 2012, the District served him with written notice that it had been recommended that notice be given to him pursuant to Education Code sections 44949 and 44955 that his services would be reduced or would not be required for the 2012-2013 school year. The written notice set forth the reasons for the recommendation and noted that the District's Board of Trustees had passed Resolution No. 2011/2012 #2 reducing the certificated staff by 1.0 full-time equivalent (FTE) position. Mr. Lingg timely requested, in writing, a hearing to determine if there is cause for not reemploying him for the ensuing school year.

3. Assistant Superintendent Garcia made and filed an Accusation against Mr. Lingg. The Accusation with required accompanying documents and blank Notices of Defense were timely served on Mr. Lingg. Mr. Lingg timely filed a Notice of Defense to the Accusation. All pre-hearing jurisdictional requirements were satisfied.

4. On March 12, 2012, at a regular meeting, the District's Board of Trustees was given notice of Assistant Superintendent Garcia's recommendation that certificated employees holding 1.00 FTE positions be given notice that their services would be reduced or not required for the next school year and stating the reasons for that recommendation.

5. On March 12, 2012, the District's Board of Trustees determined that it was necessary to reduce or eliminate programs and services and therefore necessary to reduce or eliminate certificated services affecting employment of 1.00 FTE position. The Board of Trustees adopted Resolution No. 2011/2012 #2 providing for the reduction of the Counseling Program, resulting in the elimination of 1.00 FTE certificated counselor.

In determining the extent by which to reduce or eliminate particular kinds of services, the District's Board of Trustees considered all positively assured attrition up to and including the date of the resolution. The total number of positions to be reduced or eliminated under this resolution is 1.0 FTE certificated position. The Board of Trustees determined that the services of a corresponding number of certificated employees shall be terminated at the close of the current 2011-2012 school year.

6. The District maintains a seniority list for all certificated employees who hold non-teaching positions, such as school nurses, psychologists, and counselors. Mr. Lingg is a school counselor and holds a clear pupil personnel services credential, with an authorization in school counseling. His seniority date is August 24, 1994, a date he shares with no other certificated employee. There are four certificated employees who are not employed in teaching positions and are junior to Mr. Lingg in terms of seniority – Marilyn Glinskas, Laura Forystek, Bobbie Ables-Smith, and Lorraine Dugan. Mss. Glinskas and Dugan both hold a professional school nurse services credential and are employed as school nurses, a

service which Mr. Lingg is neither certificated nor competent to perform. Mss. Forystek and Ables-Smith both hold clear pupil personnel services credentials, with an authorization in school psychology. Ms. Ables-Smith has an additional authorization in school counseling. Both Mss. Forystek and Ables-Smith are employed as school psychologists, a service which Mr. Lingg concedes he is neither certificated nor competent to perform.

7. No permanent or probationary certificated employee with less seniority is being retained to render a service for which Mr. Lingg is certificated and competent to perform.

8. The reduction or elimination of the particular kinds of services set forth in Resolution No. 2011/2012 #2 are related to the welfare of the schools and the students thereof within the meaning of Education Code sections 44949 and 44955. The Board of Trustees' decision to reduce or discontinue these services is neither arbitrary nor capricious, but rather a proper exercise of its discretion

LEGAL CONCLUSIONS

1. Education Code section 44955, subdivision (b), provides the following with regard to a school district's authority to layoff certificated employees.

Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires the modification of curriculum, and when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

In computing a decline in average daily attendance for purposes of this section for a newly formed or reorganized school district, each school of the district shall be deemed to have been a school of the newly formed or reorganized district for both of the two previous school years.

As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof. Upon the request of any employee whose order of termination is so determined, the governing board shall furnish in writing no later than five days prior to the commencement of the hearing held in accordance with Section 44949, a statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to the other employees in the group. This requirement that the governing board provide, on request, a written statement of reasons for determining the order of termination shall not be interpreted to give affected employees any legal right or interest that would not exist without such a requirement.

2. Education Code section 44949 provides the following with regard to a school district's jurisdiction to layoff certificated employees:

(a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

Until the employee has requested a hearing as provided in subdivision (b) or has waived his or her right to a hearing, the notice and the reasons therefor shall be confidential and shall not be divulged by any person, except as may be necessary in the performance of duties. However, the violation of this requirement of confidentiality, in and of itself, shall not in any manner be construed as affecting the validity of any hearing conducted pursuant to this section.

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. A request for a hearing shall be in writing and shall be delivered to the person who sent the notice pursuant to subdivision (a), on or before a date specified in that subdivision, which shall not be less than seven days after the date on which the notice is served upon the employee. If an employee fails to request a hearing on or before the date specified, his or her failure to do so shall constitute his or her waiver of his or her right to a hearing. The notice provided for in subdivision (a) shall advise the employee of the provisions of this subdivision.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

(1) The respondent shall file his or her notice of defense, if any, within five days after service upon him or her of the accusation and he or she shall be notified of this five-day period for filing in the accusation.

(2) The discovery authorized by Section 11507.6 of the Government Code shall be available only if request is made therefor within 15 days after service of the accusation, and the notice required by Section 11505 of the Government Code shall so indicate.

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision prepared by the administrative law judge shall be binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district shall not constitute cause for dismissing the

charges unless the errors are prejudicial errors. Copies of the proposed decision shall be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced. All expenses of the hearing, including the cost of the administrative law judge, shall be paid by the governing board from the district funds.

The board may adopt from time to time such rules and procedures not inconsistent with provisions of this section as may be necessary to effectuate this section.

(d) Any notice or request shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee.

(e) If after request for hearing pursuant to subdivision (b) any continuance is granted pursuant to Section 11524 of the Government Code, the dates prescribed in subdivision (c) which occur on or after the date of granting the continuance and the date prescribed in subdivision (c) of Section 44955 which occurs after the date of granting the continuance shall be extended for a period of time equal to the continuance.

The District complied with all notice and jurisdictional requirements set forth above.
(Factual Findings 2 and 3.)

3. The services identified in Resolution No. 2011/2012 #2 are particular kinds of services that may reduced or eliminated under Education Code section 44955. The Board of Trustees' decision to reduce or discontinue the identified services was neither arbitrary nor capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuance of services relates solely to the welfare of the District's schools and their pupils within the meaning of Education Code section 44949.

4. The District correctly identified the certificated employees providing the particular kinds of services that the Board of Trustees directed be reduced or discontinued in Resolution No. 2011/2012 #2.

5. No permanent or probationary employee with less seniority is being retained to render a service for which Mr. Lingg is certificated and competent to perform.

6. Cause exists to give notice to Mr. Lingg that his services will be reduced or will not be required for the 2012-2013 school year because of the reduction or discontinuance of particular kinds of services.

RECOMMENDATIONS

1. Cause exists for the Empire Union School District to reduce or eliminate a 1.00 full-time equivalent certificated position at the end of the 2011-2012 school year.
2. Notice may be given to Mr. Lingg that his services will be reduced or will not be required for the 2012-2013 school year.

DATED: April 25, 2012

COREN D. WONG
Administrative Law Judge
Office of Administrative Hearings